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FILED
SAN MATEO COUNTY

MAY 06 2019

Clerk of the Superior Court

~~DEPUTY CLERK~~



SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

12 SIX4THREE, LLC, a Delaware limited liability
company,

13 Plaintiff,

14 v.

15 FACEBOOK, INC., a Delaware corporation;
16 MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual; JAVIER
17 OLIVAN, an individual; SAMUEL LESSIN, an
individual; MICHAEL VERNAL, an individual;
18 ILYA SUKHAR, an individual; and DOES 1-50,
inclusive,

19 Defendants.
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Case No.: CIV 533328

Assigned for all purposes to Hon. V.
Raymond Swope, Dept. 23

**EX PARTE APPLICATION TO STAY
DISCOVERY**

Date: May 10, 2019
Time: 9:00 a.m.
Dept.: 23
Judge: Hon. V. Raymond Swope
Trial Date: April 25, 2019 [Vacated]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as the matter may be heard, in Department 23 of the above-entitled court, located at 400 County Center, Redwood City, CA 94063, BIRNBAUM & GODKIN, LLP ("B&G") will and hereby does apply *ex parte* for an order staying all discovery proceedings in this matter until Plaintiff Six4Three, LLC ("SIX4THREE") retains counsel and can be properly represented in such discovery proceedings. The court should stay discovery until at least June 28, 2019, the date set for the Complex Case Status Conference to consider

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1 the status of counsel and Plaintiff's representation in this matter.

2 The application is brought on the ground that good cause exists to stay discovery in this matter
3 so that the Plaintiff has counsel to represent its interests in such discovery proceedings. Permitting
4 discovery to take place while the Plaintiff is without the benefit of counsel will result in substantial
5 prejudice. Plaintiff in this matter has effectively been without counsel since at least March 13, 2019, the
6 date on which the court heard B&G's motion to withdraw as counsel and took the matter under
7 submission.

8 As an example, Defendant FACEBOOK, INC. ("FACEBOOK") recently served a subpoena on
9 Theodore Kramer, the principle of Plaintiff SIX4THREE. While Theodore Kramer is personally
10 represented by counsel, Plaintiff SIX4THREE is not. SIX4THREE cannot represent itself. Allowing
11 discovery to move forward now will result in the waste of judicial resources as any discovery that takes
12 place while Plaintiff is unrepresented will have to be relitigated once SIX4THREE retains counsel.

13 The application is necessary because it is not possible for discovery to continue while Plaintiff
14 SIX4THREE is proceeding in *propria persona*. As a corporation, SIX4THREE cannot proceed in
15 *propria persona* and needs to secure independent counsel in order to engage in the ongoing discovery.
16 SIX4THREE's former counsel respectfully requests that the court stay discovery until such time as all
17 parties are represented by independent counsel.

18 Further, the application for an order staying discovery is necessary pending the court's
19 clarification of the March 15, 2019 Court Order reopening discovery and allowing discovery of attorney-
20 client communications. As it stands, the scope of the waiver contemplated by the crime/fraud exception
21 is undefined and overbroad. Any waiver should be narrowly defined and limited to communications
22 concerning Theodore Kramer's disclosure under subpoena to British Parliament's Digital, Culture Media
23 and Sport Committee ("DCMS"). Allowing discovery to proceed concerning attorney-client
24 communications without clarifying and clearly defining the scope of the order allowing for the discovery
25 of such communications is incompatible. Once attorney-client communications are disclosed, there
26 would be no way to undo the discovery of such information. In short, given the sanctity of the attorney-
27 client privilege and the potential to incorrectly eviscerate the attorney-client privilege to which there
28 would be no remedy, the prudent course of action to ensure that no permanent harm is done to

1 SIX4THREE and its former counsel is to grant a stay of discovery, including the discovery proceedings
2 addressed in the March 15, 2019 order. In the alternative, B&G can file a motion to reconsider the March
3 15, 2019 order.

4 B&G respectfully requests that the Court grant B&G's request for an order staying any discovery
5 until Plaintiff SIX4THREE retains new counsel and pending a clarification of the March 15, 2019 order
6 limiting the scope of the waiver to attorney-client communications under the crime/fraud exception.

7 This Application is based on the Application itself; the Memorandum of Points and Authorities
8 and the statutory and case law cited therein; the Declaration of Joseph S. Leveroni; the pleadings,
9 records, and papers on file in this action; and other oral and documentary evidence as may be presented
10 at the time of hearing.

11 Pursuant to California Rules of Court, Rules 3.1203 and 3.1204, B&G gave timely notice of its
12 intent to present this *ex parte* application to all counsel of record by letter brief emailed to the parties on
13 Thursday, May 2, 2019. (Declaration of Joseph S. Leveroni ("Leveroni Decl.,").

14
15 DATED: May 6, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

16
17
18 By


James A. Murphy

Joseph S. Leveroni

Attorneys for BIRNBAUM & GODKIN, LLP

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2 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF B&G's REQUEST TO**
3 **STAY MARCH 15, 2019 ORDER AND ALL DISCOVERY PROCEEDINGS UNTIL**
4 **PLAINTIFF RETAINS COUNSEL**

5 B&G moves for an order staying discovery, including the March 15, 2019 Order Re: Defendant
6 Facebook Inc.'s Motion to Open Discovery and to Compel pending SIX4THREE retaining counsel and
7 pending a clarification of the scope of the crime/fraud exception as included in the March 15, 2019
8 Order.

9 **I. RELEVANT FACTS**

10 On March 15, 2019, while SIX4THREE's former counsel's motions to be relieved as counsel
11 were under submission with the Court, the Court granted, in part, and denied, in part, FACEBOOK's
12 Motion to Open Discovery and to Compel. Specifically, the Court ruled that the "opening of discovery
13 is limited to the revealing or discussing of Facebook's confidential information pursuant to Stipulated
14 Protective Order, paragraph 6 and disclosures or providing thereof." The Court granted FACEBOOK
15 leave to serve requests for production or subpoena *duces tecum*, whichever is the appropriate method,
16 on Mr. Gross, Mr. Godkin, Mr. Kramer, and Mr. Scaramellino, as set forth in Exhibit A to the order. The
17 Court further ordered that the attorney-client privilege is waived pursuant to the crime-fraud exception.
18 Plaintiff SIX4THREE was effectively without counsel for the hearing on March 15, 2019.

19 The order assumes that there were disclosures of confidential information that occurred above
20 and beyond the disclosure made by Mr. Kramer to the DCMS, though Facebook presented no evidence
21 of such additional disclosures. To support the allegation that Plaintiff's former counsel was involved in
22 the disclosure of the confidential information, Facebook could only point to the disclosure of publicly
23 available documents, for instance, in an unredacted and unsealed complaint. In fact, all available
24 evidence confirms that the only actual disclosure of confidential information was indeed the single
25 disclosure made by Mr. Kramer to the DCMS pursuant to subpoena. Accordingly, to the extent the
26 Court's ruling as to waiver of the attorney-client privilege is sustained, any waiver should be narrowly
27 defined and limited to communications concerning Mr. Kramer's single disclosure to the DCMS.
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1 It is well-established in California that a corporation cannot represent itself in a court of record
2 either *in propria persona* or through an officer or agent who is not an attorney. (*Caressa Camille, Inc.*
3 *v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1101, citing *Merco Constr.*
4 *Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 727, 729.) Thus, if the court does not abate
5 discovery proceedings, it will be forcing SIX4THREE to participate in discovery in violation of this
6 well-established rule prohibiting corporations from participating in such court proceedings *in propria*
7 *persona*.

8 Second, if the court does not grant this application for an order staying discovery, all discovery
9 that transpires while Plaintiff is unrepresented will have to be readdressed and relitigated once
10 SIX4THREE retains counsel. Facebook's deposition subpoena of Mr. Kramer is a perfect example of
11 such an avoidable scenario of judicial *ineconomy*. Notably, any privileges applicable here belong to the
12 corporation. Given Mr. Kramer's role as the principle of Plaintiff SIX4THREE, SIX4THREE's interests
13 must be represented at his deposition. SIX4THREE's interests must also be represented in connection
14 with any document production. This cannot happen until SIX4THREE retains counsel. Thus, without a
15 stay of such a discovery proceeding, the deposition and document production would go forward to the
16 exclusion of the Plaintiff in this matter, and would require that the deposition and document production
17 be revisited at a later date when Plaintiff retains counsel and is finally capable of participating in the
18 discovery process.

19 **B. Clarification Regarding the Scope of the Waiver of the Attorney-Client Privilege Included**
20 **in the March 15, 2019 Order Regarding the Crime/Fraud Exception:**

21 As referenced above, the nature of the allegations by FACEBOOK is such that FACEBOOK has
22 invoked the crime-fraud exception under Evidence Code 956. The March 15, 2019 Court Order found
23 that the crime/fraud exception applied to the allegations set forth by FACEBOOK and waived the
24 attorney-client privilege on that basis. However, the order is vague as to the basis for the finding that the
25 crime/fraud exception applies and is similarly vague as to the scope of the communications that are
26 discoverable under the resulting waiver of the attorney-client privilege.

27 As mentioned above, there are many unfounded claims by Facebook that various parties in this
28 case disclosed confidential Facebook information to third parties. However, there is only evidence of

one instance where confidential information was disclosed, where Mr. Kramer disclosed information to DCMS pursuant to a subpoena. Thus, it would appear that the scope of the waiver addressed in the March 15, 2019 order should be limited only to those communications concerning that specific triggering act - Mr. Kramer's disclosure of information to the DCMS.

Given the sanctity of the attorney client-privilege at issue and now subject to waiver by the March 15, 2019 order, all discovery permitted under the order should be stayed until the court clarifies the scope of the communications that will be subject to discovery under crime/fraud exception.

Good cause exists to stay discovery proceedings in this matter pending clarification of the March 15, 2019 order waiving the attorney-client privilege. Pursuant to Code of Civil Procedure § 2031.060(b), the “court, for good cause shown, may make any order that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.” Requiring SIX4THREE and counsel to disclose attorney-client communications without first clarifying the overbroad and vague order would in itself constitute “annoyance, embarrassment, or oppression,” which the Court is expressly empowered to prevent. *Rosemont v. Sup. Ct.* (1964) 60 Cal.2d 711, 714. The prudent course would be to stay discovery pending clarification of the scope of the March 15, 2019 order. To allow the discovery to go forward under the order without further clarification would lead to the disclosure of privileged communications beyond the scope of what should be a very limited waiver under the narrow application of the crime/fraud exception. Such unwarranted disclosures of privileged communications would cause irrevocable damage to Plaintiff SIX4THREE.

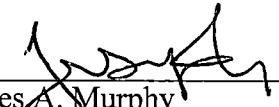
III. CONCLUSION

For the foregoing reasons, B&G respectfully requests that the Court GRANT this ex parte application.

1 DATED: May 6, 2019

2 MURPHY, PEARSON, BRADLEY & FEENEY

3
4 By

5 
James A. Murphy

6 Joseph S. Leveroni

7 Attorneys for BIRNBAUM & GODKIN, LLP

8 DATED: May 6, 2019